Ahmad Suhairi bin Mat Ali v CIMB Bank Bhd & Anor

HIGH COURT (PENANG) — APPLICATION FOR JUDICIAL REVIEW NO PA-25–50–08 OF 2019
KENNETH ST JAMES JC
27 OCTOBER 2022

Civil Procedure — Stay of execution of judgment — Stay of execution pending appeal — Whether there were special circumstances justifying stay — Whether appeal would be rendered nugatory if judgment enforced — Whether applicant would be denied fruits of appeal — Whether applicant would be prejudiced by stay — Whether balance of convenience in favour of bank — Whether conditional stay should be granted

This was the first respondent's application for a stay of execution pending appeal. The applicant, who had worked for the first respondent (bank) for approximately 22 years had claimed constructive dismissal against the bank. The Industrial Court, however, handed down its award against the applicant. Being dissatisfied, the applicant filed for judicial review. In deciding for the applicant, the High Court ordered the bank to pay the applicant the judgment sum with costs ('High Court order'). The bank appealed against the High Court order to the Court of Appeal and filed this application in the High Court for a stay of execution on the grounds that: (a) there were special circumstances that compelled this court to exercise its discretion to grant a stay because the bank's appeal would be rendered nugatory if the High Court order was executed or enforced; (b) there was a likelihood that the bank would be denied the fruits of its appeal if the judgment sum was disposed of by the applicant; (c) the applicant was not prejudiced as the bank had the means to pay the judgment sum; and (d) the balance of convenience or the balance of justice were in favour of the bank, as the judgment sum could be deposited in a stakeholder's account until the disposal of the appeal.

Held, allowing the application with conditions:

(1) The affidavit in support of the bank's application failed to disclose any special or extraordinary circumstances that justified the grant of a stay. Instead, what the affidavit in support disclosed was the bank's preparedness to place the judgment sum in an account that was managed by the applicant's counsel. The banks proposal was in affect a proposal to the applicant to agree to a conditional stay, namely, the applicant was not to execute the judgment sum against the bank, as the money was now preserved in a bank account, to be released only when there was an outcome in the bank's appeal. If the bank lost in the appeal, the judgment

sum would be released to the applicant. If the bank succeeded in the appeal, the judgment sum could immediately be returned to the bank without any further legal proceeding to recover the money. This would mean that the applicant was made to wait until the outcome of the bank's appeal, instead of being allowed to promptly reap the benefit of the judgment sum. This was contrary to the principle that the successful litigant should be allowed to enjoy the fruits of his litigation (see paras 28–32).

(2) The applicant was entitled to utilise the judgment sum in any way that he choose to. There was no evidence to show that the applicant would not return the judgment sum if the bank ultimately succeeded in its appeal. In the applicant's affidavit in reply to oppose this stay application, the applicant made positive assertions that he was able to return the money, and that he had had no financial problems throughout the Industrial Court and High Court proceedings. This ground was nothing more than the bank's speculative fear that it may not be able to recover the judgment sum from the applicant, if the bank ultimately won its appeal. This fear could not be tantamount to a special circumstance that necessitated a stay of the High Court order (see paras 37–38 & 41).

(3) The applicant pursued an Industrial Court case. Although he lost at the Industrial Court, the applicant persevered with judicial review at the High Court. The High Court held in his favour and ordered the bank to pay him back-wages and compensation. The applicant should be allowed to timeously enjoy the favourable outcome of more than nine years of litigation. A stay of the payment of the judgment sum to the applicant was indeed a prejudice caused upon him. Accordingly, the court was not moved to grant a total or absolute stay on this ground (see paras 43–44).

(4) The bank's ability to pay the judgment sum and the bank's willingness to place the judgment sum in an account did not tip the balance of convenience nor the balance of justice in the bank's favour. It was not more convenient or fairer to the parties just because the judgment sum was placed in an account. If the judgment sum, which was rightfully the applicant's, was placed in an account, the applicant would continue to be denied the fruits of his successful litigation. On the other hand, placing the judgment sum in an account would effectively extinguish the risk that the bank would not be able to recover the judgment sum from the applicant if the bank won its appeal, as the money never reached the applicant's hands. If the bank feared that the applicant would dispose of the judgment sum if it was paid over to him, making it irrecoverable if the bank ultimately won its appeal, then it was actually favourable to the bank if the court were to order part of the judgment sum to be deposited into an interest-bearing clients' account, to be dealt with when there was an outcome in the appeal. This would preserve at least half of the

judgment sum from being disposed of and irrecoverable. This caused no prejudice to the bank. At the same time, the applicant would get to enjoy the fruits of his litigation and get to utilise half the judgment sum (see paras 46–49).

[Bahasa Malaysia summary

Ini merupakan permohonan responden pertama untuk penangguhan pelaksanaan sementara menunggu rayuan. Pemohon, yang telah bekerja untuk responden pertama (bank) selama lebih kurang 22 tahun telah menuntut gantirugi untuk pemberhentian secara konstruktif terhadap bank itu. Mahkamah Perusahaan bagaimanapun, tidak membenarkan gantirugi pemohon. Tidak berpuas hati, pemohon memfailkan semakan kehakiman. Mahkamah Tinggi memutuskan dengan memerintahkan bank membayar jumlah penghakiman kepada pemohon dengan kos ('perintah Mahkamah Tinggi'). Bank tersebut merayu terhadap perintah Mahkamah Tinggi kepada Mahkamah Rayuan dan memfailkan permohonan ini di Mahkamah Tinggi untuk penangguhan pelaksanaan atas alasan bahawa: (a) terdapat keadaan-keadaan khas yang membolehkan mahkamah ini menggunakan budi bicaranya untuk memberikan penangguhan kerana rayuan bank akan menjadi sia-sia sekiranya perintah Mahkamah Tinggi dilaksanakan atau dikuatkuasakan; (b) terdapat kemungkinan bahawa bank tersebut akan dinafikan hasil rayuannya sekiranya jumlah penghakiman itu digunakan oleh pemohon; (c) pemohon tidak diprejudiskan kerana bank boleh membayar jumlah penghakiman; dan (d) imbangan keadilan memihak kepada bank, kerana jumlah penghakiman boleh didepositkan ke dalam akaun pihak berkepentingan sehingga pelupusan rayuan tersebut.

Diputuskan, membenarkan permohonan dengan syarat-syarat:

(1) Afidavit sokongan permohonan bank tersebut gagal mendedahkan sebarang keadaan istimewa atau luar biasa yang untuk permohonan penangguhan . Sebaliknya, ianya menyatakan kesanggupan bank untuk meletakkan jumlah penghakiman di dalam akaun yang diuruskan oleh peguam pemohon. Cadangan bank tersebut telah menjejaskan cadangan kepada pemohon untuk bersetuju dengan penangguhan bersyarat, iaitu, pemohon tidak melaksanakan jumlah penghakiman terhadap bank, kerana wang itu kini disimpan dalam akaun bank,yang akan dikeluarkan selepas keputusan rayuan bank. Sekiranya bank gagal dalam rayuan tersebut, jumlah penghakiman akan dikeluarkan dan dimasukkan kepada pemohon. Sekiranya bank berjaya dalam rayuan tersebut, jumlah penghakiman dikembalikan kepada bank tanpa sebarang prosiding undang-undang selanjutnya untuk mendapatkan semula wang tersebut. Ini bermakna pemohon harus menunggu sehingga keputusan rayuan bank tersebut, dan bukannya dibenarkan untuk segera memperoleh jumlah penghakiman. Ini bertentangan dengan prinsip bahawa litigan

yang berjaya harus dibenarkan menikmati hasil litigasinya (lihat perenggan 28–32).

(2) Pemohon berhak menggunakan jumlah penghakiman dalam apa jua cara yang dikehendaki. Tiada bukti yang menunjukkan bahawa pemohon tidak dapat mengembalikan jumlah penghakiman sekiranya bank akhirnya berjaya dalam rayuan mereka. Dalam afidavit balasan pemohon untuk membantah permohonan penangguhan ini, pemohon membuat penegasan positif bahawa dia dapat mengembalikan wang itu dan dia tidak mempunyai masalah kewangan sepanjang prosiding Mahkamah Perusahaan dan Mahkamah Tinggi. Alasan ini hanyalah merupakan kerisauan bank yang berbentuk spekulasi bahawa mereka mungkin tidak dapat mendapatkan semula jumlah penghakiman daripada pemohon, sekiranya bank berjaya di dalam rayuannya. Kerisauan ini bukanlah satu keadaan khas yang mewajarkan penangguhan perintah Mahkamah Tinggi (lihat perenggan 37–38 & 41).

(3) Pemohon telah memulakan kes di Mahkamah Perusahaan. Walaupun dia tidak berjaya di Mahkamah Perusahaan, pemohon meneruskan tindakan semakan kehakiman di Mahkamah Tinggi. Mahkamah Tinggi memihak kepadanya dan memerintahkan bank membayar balik gaji dan pampasan kepadanya. Pemohon harus dibenarkan untuk memperoleh hasil dari sembilan tahun litigasi berkenaan. Penangguhan pembayaran jumlah penghakiman kepada pemohon merupakan satu prasangka yang ditimbulkan. Oleh itu, mahkamah tidak seharusnya memberikan penangguhan mutlak atas alasan ini (lihat perenggan 43–44).

(4) Keupayaan bank untuk membayar jumlah penghakiman dan cadangan bank untuk meletakkan jumlah penghakiman dalam akaun tidak menjejaskan keseimbangan keadilan kepada bank. Ianya bukanlah lebih adil kepada pihak-pihak jika jumlah penghakiman diletakkan dalam akaun. Sekiranya jumlah penghakiman, yang sepatutnya pemohon, diletakkan di dalam akaun, pemohon akan terus dinafikan hasil litigasinya. Sebaliknya, meletakkan jumlah penghakiman dalam akaun akan mengenepikan risiko bahawa bank tidak akan dapat mendapatkan semula jumlah penghakiman dari pemohon jika bank berjaya di dalam rayuannya, kerana wang itu tidak pernah sampai ke tangan pemohon. Sekiranya bank risau bahawa pemohon akan menggunakan jumlah penghakiman tersebut dan menjadikannya tidak dapat dipulihkan jika bank berjaya di dalam rayuannya, maka ianya akan menguntungkan bank jika mahkamah memerintahkan sebahagian daripada jumlah penghakiman didepositkan ke dalam akaun pelanggan yang mempunyai kadar faedah apabila terdapat keputusan dalam rayuan itu. Ini akan mengekalkan sekurang-kurangnya separuh dari jumlah penghakiman dari dilupuskan dan tidak dapat dipulihkan. Hal ini tidak memprejudiskan bank. Pada masa yang sama, pemohon akan dapat

menikmati hasil litigasinya dan dapat memperoleh separuh jumlah penghakiman tersebut (lihat perenggan 46–49).]

Cases referred to

Chan Hak Foon v Sutera Harbour Sdn Bhd & Anor [2009] MLJU 423; [2009] 9 CLJ 109, HC (folld)

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213; [2013] 3 CLJ 47, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1, FC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 AMR 2867; [2002] 3 CLJ 380, CA (refd)

Renew Capital Sdn Bhd & Ors v ADM Ventures (M) Sdn Bhd & Anor and another appeal [2022] 6 MLJ 58; [2022] 5 AMR 353; [2022] 8 CLJ 817, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 s 73
Rules of Court 2012 O 45 r 11

Pravin Kaur Jessy (Meghala & Co) for the applicant.
David Tan Seng Keat (T Thavalingam & Co) for the first respondent.

Kenneth St James JC:

PRELUSION

[1] The applicant (employee) lost in the Industrial Court. The applicant filed for judicial review in the High Court, to quash the Industrial Court award. The applicant won in the High Court. The High Court substituted the Industrial Court award with an order that the first respondent (the employer bank) pays the applicant the judgment sum of RM442,117.20 as the net sum of back-wages and compensation in lieu of reinstatement. As well as costs of RM10,000.

[2] The bank appealed to the Court of Appeal. The bank then filed this application for a stay of execution pending its appeal. I granted a *conditional stay* of the execution of the judgment sum. The bank has now appealed against the order for a conditional stay.

[3] The distinctive issue here is that the order made was for a conditional stay (a stay of the execution of a part of the judgment sum), as opposed to a complete stay (a stay of the execution of the entire judgment sum). Here are my reasons for ordering a conditional stay.

THE UNDISPUTED FACTS AND EVENTS

[4] The applicant worked for the bank for approximately 22 years. His last monthly salary was RM10,731, with a RM750 car allowance.

[5] Because of various events that happened, the applicant wrote to the bank to assert that the bank constructively dismissed him. This was in *July 2012*. An Industrial Court case ensued.

[6] The Industrial Court case started around August 2013. The Industrial Court handed down its award in May 2019. It was against the applicant.

[7] Being dissatisfied, the applicant filed for judicial review. The High Court delivered its judgment in *July 2021* ('13 July 2021 order') and ordered the bank to pay the applicant the judgment sum, with costs.

[8] The bank appealed against the High Court order to the Court of Appeal. And accordingly filed this application for a stay of execution.

THE TERMS OF THE BANK'S STAY APPLICATION

[9] The bank's application prays:

(a) that all execution and enforcement proceedings arising out of the 13 July 2021 order be stayed pending the disposal of its appeal to the Court of Appeal; and

(b) in the alternative, that all execution and enforcement proceedings arising out of the 13 July 2021 order be stayed for an interim period of one month for the bank to file a stay application in the Court of Appeal.

THE BANK'S GROUNDS FOR A STAY OF EXECUTION

[10] The bank's pertinent grounds for a stay of execution include:

(a) there are special circumstances that compel this court to exercise its discretion to grant a stay because the bank's appeal will be rendered nugatory if the 13 July 2021 order is executed or enforced;

(b) there is a likelihood that the bank will be denied the fruits of its appeal if the judgment sum is disposed of by the applicant;

(c) the applicant is not prejudiced as the bank has the means to pay the judgment sum; and

(d) the balance of convenience or the balance of justice are in favour of the bank, as the judgment sum can be deposited in a stakeholder's account until the disposal of the appeal.

PRINCIPLES RELEVANT FOR THIS STAY APPLICATION

[11] There are several principles that I am to consider and bound to apply, in this stay application. First, an appeal will not operate as a stay of execution, unless the court orders a stay: s 73 of the Courts of Judicature Act 1964.

[12] The relevant portion of section 73 provides as follows:

> Section 73 Appeal not to operate as stay of execution.
>
> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders ...

[13] Second, the court should not deprive the successful party (here: the applicant) the fruits of his litigation, pending the losing party's appeal to an appellate court, unless there are 'special circumstances' to warrant a stay. In other words, the successful party should not be made to wait for the outcome of the opposite party's appeal, before he can enjoy the relief or remedy granted to him, *unless there are 'special circumstances'* that compel the grant of a stay: *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 5 AMR 758; [2003] 4 CLJ 1 (FC) and *Renew Capital Sdn Bhd & Ors v ADM Ventures (M) Sdn Bhd & Anor and another appeal* [2022] 6 MLJ 58; [2022] 5 AMR 353; [2022] 8 CLJ 817 (CA).

[14] In *Kosma Palm Oil Mill*, the Federal Court, through Justice Augustine Paul JCA (as he was then) held as follows:

> 7 The general rule is that an appeal shall not operate as a stay of execution unless the court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116 while commenting on the discretion to grant a stay:
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> > But it is a clear principle that *the court will not deprive a successful party of the fruits of his litigation until an appeal is determined*, unless the unsuccessful party can show special circumstances to justify it. (Emphasis added.)

[15] In *Renew Capital*, the Court of Appeal, through Justice Lee Swee Seng JCA, while citing and discussing *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 AMR 2867; [2002] 3 CLJ 380 (CA), enunciated this:

> [24] Thus it has been said ever so often that *a successful litigant is generally not to be deprived of the fruits of his litigation*. The law does not require that the unsuccessful litigant who is minded to appeal must be allowed to exhaust all avenues and tiers of

A appeal before the successful litigant, armed with a judgment of the court, especially for the payment of a judgment debt, may proceed with the execution of the judgment debt. (Emphasis added.)

B **[16]** Third, the party who is applying for a stay of execution must set out the special circumstances that warrant a stay, *by affidavit evidence*. And, the special circumstances must relate to the execution or enforcement of the judgment: *Kosma Palm Oil Mill*.

C **[17]** The Federal Court in *Kosma Palm Oil Mill* said:

D [23] The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. *The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application* (see *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406). Where it is alleged that there is a danger of the unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the insolvency of the other party, this must be shown in the affidavit (see *The Annot Lyle* (1886) 11 PD 114). (Emphasis added.)

E **[18]** Fourth, the courts have an *unfettered discretion* whether to grant a stay, as long as the discretion is exercised judiciously: *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213; [2013] 3 CLJ 47.

F **[19]** In *Jagdis Singh*, the Court of Appeal, through Justice Zawawi Salleh propounded:

G [22] Now, what factors or principles will, and should, guide the courts in applications for a stay of an order granted by a court ... The factors or principles so enumerated are inexhaustive, and not all of them are applicable to every case. Each has its own peculiar principle. Some of the principles to be considered in the motions may be stated as follows:

H (a) *the courts have an unimpeded discretion to grant or refuse stay*. In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically (see *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116; *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86) ... (Emphasis added.)

[20] Fifth, the court has the power and the discretion to grant a stay 'on such terms as it thinks fit': O 45 r 11 of the Rules of Court 2012. This means that *I can order a conditional stay*.

I **[21]** Order 45 r 11 is set out here:

11 Matters occurring after judgment: Stay of execution (O 45, r 11)

Without prejudice to Order 47, rule 1, a party against whom a judgment has been

given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and *the Court may by order grant such relief, and on such terms, as it thinks fit.* (Emphasis added.)

[22] Sixth, I am to consider the principle of not depriving the successful party the fruits of his litigation in this manner — where the judgment is a monetary judgment, if I grant a stay, the successful party will have to wait until the disposal of the losing party's appeal before the successful party can get the judgment sum; and this is only if the successful party succeeds again in the appeal; also, the successful party probably still has to file execution proceedings before he can get the judgment sum. This circumstance tantamounts to depriving the successful party the fruits of his litigation.

[23] On the other hand, if I refuse a stay, the successful party will insist on being paid the judgment sum immediately. Then if the losing party pays over the judgment sum, but succeeds on appeal, the judgment sum has to be returned. The plaintiff/applicant, who was paid the judgment sum, may resist returning it to the defendant/respondent. The tables are now turned and the defendant now has to file proceedings to recover the judgment sum. This converse circumstance also tantamounts to depriving the successful party the fruits of his litigation.

[24] I must take into account the relevant factors, as well as *balance the rights and interests of the competing parties*, and consider granting a stay on terms ie a conditional stay. In other words, I am not confined or compelled to only grant or refuse an outright stay. I can and should consider granting a conditional stay, if it is more equitable to do so: *Renew Capital*.

[25] In *Renew Capital*, the Court of Appeal stated these views:

> [31] This dilemma was captured in the dicta of Vincent Ng J (later JCA) in *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493; [2000] 3 CLJ 361 where His Lordship observed thus:
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> > *The justice of the case on stay is arrived at by striking a judicious and equitable balance* between the principle that the successful party in the litigation ought to be allowed to reap the fruits of that litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory.
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> [32] *Courts have increasingly been more inclined to explore a partial conditional stay upon terms to balance the competing rights, interest, needs and concerns of the parties* without offending the general principle that generally a party [to] a successful litigation even at first instance is entitled to the fruit of its litigation unless 'special circumstances' can be shown by the unsuccessful party that is appealing.

...

[39] There are various factors that the court may consider in the exercise of its discretion to grant a stay, whether it be unconditional or conditional. It involves *a fine balancing exercise in weighing and considering the relevant factors for and against a stay and if conditions are imposed, the reasonable conditions having in mind the rights, interests, needs and concerns of the parties* ...

...

[64] Whilst the circumstances may not justify an unconditional stay, nevertheless *the court in the exercise of its discretion may explore whether the circumstances may justify a conditional stay of either the whole or part of the judgment debt and if so the conditions that may be fair and reasonable having regard to all relevant factors.*

...

[90] Mere words of assurance that the sum paid would be safe is not good enough for words are cheap and one must be prepared to give a more tangible assurance that what is paid would be recoverable. This is where this *court would need, having regard to the realities of the circumstances and the rights, interests, needs and concerns of the parties, to explore factors that it may have regard to for a conditional stay* that would promote business efficacy and prevent money paid from being irrecoverable when one should ultimately be successful though having lost at first instance.

ARE THERE SPECIAL CIRCUMSTANCES THAT COMPEL THE GRANT OF A STAY?

[26] I find that the affidavit in support of the bank's application for stay does not disclose any facts that demonstrate special circumstances that justify a stay of execution.

[27] The affidavit in support merely refers to and exhibits the application for judicial review, the 13 July 2021 order for the bank to pay the judgment sum to the applicant, the bank's notice of appeal to the Court of Appeal, and the bank's solicitors' two letters dated 22 July 2021 and 23 August 2021.

[28] By these two letters, the bank proposed to deposit the judgment sum of RM442,117.20 into an interest-bearing stakeholders' account that is held either by the bank's solicitors or by the applicant's counsel.

[29] The bank's letters are, in effect, a proposal to the applicant to agree to a conditional stay, that is, the applicant is not to execute the judgment sum against the bank, as the money is now preserved in a bank account, to be released only when there is an outcome in the bank's appeal.

[30] The affidavit in support fails to disclose any special or extraordinary circumstances that justify the grant of a stay. Instead, what the affidavit in

support discloses is the bank's preparedness to place the judgment sum in an account that is managed by the applicant's counsel. This will secure the judgment sum until the outcome of the bank's appeal.

[31] If the bank loses in the appeal, the judgment sum will be released to the applicant. If the bank succeeds in the appeal, the judgment sum can immediately be returned to the bank without any further legal proceeding to recover the money.

[32] But this would mean that the applicant is made to wait until the outcome of the bank's appeal, instead of being allowed to promptly reap the benefit of the judgment sum. This is contrary to the principle that the successful litigant should be allowed to enjoy the fruits of his litigation.

[33] I also note that the bank does not propose to pay the applicant the RM10,000 cost that was awarded in favour of the applicant in the judicial review proceeding. This indicates to me that the bank does not intend to pay over to the applicant *any sum of money* to satisfy the judgment sum and the costs awarded.

[34] Further, within this ground, the bank mentions that its appeal will be nugatory and rendered academic if the 13 July 2021 order is enforced. But the bank does not elaborate as to how and why its appeal will be nugatory and rendered academic.

[35] I am left to take it that what the bank meant is that if it pays over the judgment sum to the applicant, and the bank wins its appeal, it may not be able to recover the judgment sum from the applicant. But again, the bank does not aver as to what it is about the circumstances, or about the state or conduct of the applicant, that will cause the bank to be unable to recover the money back from the applicant.

[36] And so I find that the bank has not demonstrated that there are special circumstances to justify a stay.

WILL THE BANK BE DENIED THE FRUITS OF ITS APPEAL IF THE APPLICANT DISPOSES THE JUDGMENT SUM?

[37] The applicant is entitled to utilise the judgment sum in any way that he chooses to. The bank's argument is that the applicant will not return the judgment sum if the bank ultimately succeeds in its appeal.

[38] I find, however, that there is *no evidence* that shows that the applicant will not, or will not be able to, return the judgment sum to the bank. In the

applicant's affidavit in reply to oppose this stay application, the applicant made *positive assertions* that he is able to return the money, and that he has had no financial problems throughout the Industrial Court and High Court proceedings.

[39] At paras 7.2 and 7.32 respectively of his affidavit in reply, the applicant averred:

(a) '… saya akan dapat mengembalikan wang kepada Responden Pertama [the bank] sekiranya rayuan yang difailkan Responden Pertama dibenarkan (yang dinafikan) oleh Mahkamah Rayuan'; [note is mine] and

(b) 'Saya tidak mempunyai apa-apa masalah kewangan dan selepas menunggu selama hampir 9 tahun 2 bulan selepas saya ditamatkan perkhidmatan secara konstruktif pada 18/7/2012 sehingga ke tarikh hari ini dan memandangkan wabak Covid-19 yang sedang merebak, saya berharap untuk menikmati hasil kemenangan saya sementara saya masih boleh menikmatinya'.

[40] These averments were not refuted by the bank.

[41] And so I am behoved to hold that this ground is nothing more than the bank's *speculative fear* that it may not be able to recover the judgment sum from the applicant, if the bank ultimately wins its appeal. This fear can hardly tantamount to a special circumstance that necessitates a stay of the 13 July 2021 order.

IS THE APPLICANT PREJUDICED IF A STAY IS GRANTED?

[42] The bank argues that the applicant is not prejudiced because the bank has the means to pay over the judgment sum, and the bank proposes to place it in an interest-bearing account to safeguard it.

[43] I am not convinced that the applicant is not prejudiced on this ground. On the contrary, I find that the applicant is indeed prejudiced. The applicant pursued an Industrial Court case. Although he lost at the Industrial Court, the applicant persevered with judicial review at the High Court. The High Court held in his favour and ordered the bank to pay him back-wages and compensation. The applicant should be allowed to timeously enjoy the favourable outcome of more than nine years of litigation. A stay of the payment of the judgment sum to the applicant is, in my view, indeed a prejudice caused upon him.

[44] Accordingly, I am not moved to grant a total or absolute stay on this ground.

IS THE BALANCE OF CONVENIENCE OR BALANCE OF JUSTICE IN FAVOUR OF THE GRANT OF A STAY?

[45] The bank argues that the balance of convenience or the balance of justice favours the bank, in that the bank is willing to place the judgment sum in an account to preserve the money from being disposed of, pending the outcome of the appeal.

[46] In my judgment, this submission is untenable. The bank's ability to pay the judgment sum and the bank's willingness to place the judgment sum in an account do not tip the balance of convenience nor the balance of justice in the bank's favour. It is not more convenient or more fair to the parties just because the judgment sum is placed in an account.

[47] The competing positions are these — if the judgment sum, which is rightfully the applicant's, is placed in an account, the applicant will continue to be denied the fruits of his successful litigation. On the other hand, placing the judgment sum in an account will effectively extinguish the risk that the bank will not be able to recover the judgment sum from the applicant if the bank wins its Appeal, as the money never reached the applicant's hands.

[48] This leads me to my rationale. If the bank fears that the applicant will dispose of the judgment sum if it is paid over to him, making it irrecoverable if the bank ultimately wins its appeal — then it is actually *favourable to the bank* if I were to order *part* of the judgment sum (for instance: half of it) to be deposited into an interest-bearing clients' account, to be dealt with when there is an outcome in the appeal. This will preserve at least half of the judgment sum from being disposed of and irrecoverable. This causes *no prejudice* to the bank.

[49] At the same time, the applicant will get to enjoy the fruits of his litigation. He will get to utilise half the judgment sum: RM221,058.60, which is by any means a substantial sum. I bear in mind here that part of the judgment sum is for the arrears in back-wages — money that was supposed to be paid to him, but was in fact not paid to him.

[50] So, a substantial sum of RM221,058.60 is preserved and secured in a clients' account (which comes with it the safeguard of the solicitors' statutory and inherent duties over the money). At the same time, another substantial sum of RM221,058.60 is released to the applicant, who succeeded in his judicial review proceeding, and who is waiting to reap the successful outcome of his legal pursuit.

A CONDITIONAL STAY OR A STAY ON TERMS

[51] Instead of granting a total and absolute stay, or wholly refusing a stay, I am granting a conditional stay. I am guided by the precedent of *Chan Hak Foon v Sutera Harbour Sdn Bhd & Anor* [2009] MLJU 423; [2009] 9 CLJ 109 (HC), where Justice David Wong Dak Wah J (later CJSS) granted a stay pending appeal, conditional upon terms that include the deposit of a sum of money into an interest-bearing solicitors' clients' account.

[52] I am also guided and bound by the authority of *Renew Capital*, to consider the competing 'rights, interests, needs and concerns of the parties' and to have regard to the 'realities of the circumstances' facing the parties, which led me to grant a conditional stay here.

[53] For all these reasons, I grant a conditional stay order on these terms:

(a) the execution or enforcement of the 13 July 2021 order is stayed pending the disposal of the bank's Court of Appeal Appeal No P-01(A)-403–07 of 2021 (the bank's appeal) on the following conditions:

(i) the bank is to pay, by 30 September 2022, the sum of RM221,058.60 into the applicant's solicitors' interest-bearing clients' account, to be managed by the applicant's solicitors. This sum will be dealt with appropriately according to the outcome of the bank's appeal; and

(ii) the bank is to pay, by 30 September 2022, the sum of RM221,058.60 with the costs of RM10,000 which was granted in the 13 July 2021 order, to the applicant by paying these two sums to the applicant's solicitors on account for the applicant, for transmission to the applicant.

(b) the bank is to pay, by 30 September 2022, costs of RM5,000 for this proceeding to the applicant by paying this sum to the applicant's solicitors on account for the applicant, for transmission to the applicant.

Conditional stay of execution granted.

Reported by K Selvaraju